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Rewang bin Tempe v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–246–08 OF 2014
ROHANA YUSUF, IDRUS HARUN AND ZAMANI A RAHIM JJCA
21 APRIL 2016

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Criminal Law — Murder — Appeal against conviction and sentence — Appellant found guilty of murder and sentenced to death — Whether miscarriage of justice occasioned against appellant — Whether trial court sufficiently considered appellant's statement made under s 112 of the Criminal Procedure Code

D

Evidence — Statement — Unsworn statement from dock — Weightage of unsworn statement — Whether appellant could elect to give unsworn statement — Whether trial court could decide on weightage of evidence of unsworn statement

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The appellant was charged and found guilty of murder of one Jamaluddin @ Atok ('the deceased') pursuant to s 302 of the Penal Code. The prosecution case was that, on the day of the incident, the appellant asked one Sini bin Raia ('PW1') to mediate the hostility between him and the deceased. The appellant together with PW1 then proceeded to the hut where the deceased was staying. When they arrived at the hut, PW1 saw the appellant was grabbing the deceased's shoulder with his left hand, whilst his right hand was holding a small kitchen knife. PW1 then warned the deceased to run away and at the same time he tried to disarm the appellant. The deceased ran towards the oil palm estate and the appellant gave chase with the knife was still in his hand. The deceased was later found dead in the oil palm plantation. The chemist ('PW6') confirmed that the 'Lady Wrangler' jeans ('exh P31A') seized from the appellant was stained with deceased blood and PW8 certified that the cause of death was 'Hypovolaemic shock due to or as a consequence of stab wound on the epigastric region on the abdomen'. In contrary with the prosecution case, the appellant contended by way of unsworn statement from the dock ('exh D1') and the statement under s 112 of the Criminal Procedure Code ('the CPC') ('exh D2') that he committed the offence in the hut. In his statement, the appellant said that he stabbed the deceased because the deceased wanted to kill him due to their previous misunderstanding. At the end of the trial, the trial court found that the prosecution had proved the case beyond reasonable doubt. The appellant was found guilty and sentenced to death. Hence this appeal. The appellant submitted that, as there was absence of the appellant's signature in exh D1, this meant that he did not understand or agree to its contents. As such,

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there was mistrial and a retrial should be ordered. The appellant further submitted that the appellant's statement in exh D2 was not sufficiently considered by the trial judge before His Lordship passed the verdict.

Held, dismissing the appeal:

(1) When the defence was called, it was the appellant's right to give an unsworn statement from the dock. If he elected to give unsworn statement, it could not be the subject of cross-examination and its weight was not the same as the evidence given on oath in the witness box. The trial court was free to give the dock statement the weight it deserves or not at all, having regard to the whole evidence before the court (see para 20).

(2) The appellant elected to put up his defence by way of giving an unsworn statement from the dock after the three alternatives of giving evidence were explained to him. The unsworn statement in exh D1 was read and explained to the appellant in Bahasa Malaysia. The appellant confirmed that exh D1 together with two other exhibits referred to in exh D1 (which included his s 112 statement, exh D2) were his statements. It appeared that the provisions of ss 180 and 181 of the CPC had been complied with. No miscarriage of justice had been occasioned against the appellant. Therefore, there was no basis for learned counsel's request for an order of trial (see para 22).

(3) Pursuant to the appeal record, the trial judge did address his mind to exh D2. However, as the evidential value of exh D1 was marginal or worthless, the statement in exh D2 could not corroborate exh D1 (see paras 23 & 27–28).

[Bahasa Malaysia summary

Perayu dituduh dan didapati bersalah kerana membunuh seorang yang bernama Jamaluddin @ Atok ('si mati') berikutan s 302 Kanun Keseksaan. Kes pihak pendakwaan adalah bahawa, pada hari kejadian, perayu meminta seorang yang bernama Sini bin Raia ('PW1') untuk menjadi pengantara permusuhan di antara dia dan si mati. Perayu bersama PW1 kemudiannya terus ke pondok di mana si mati tinggal. Apabila mereka tiba di pondok tersebut, PW1 melihat perayu menyambar bahu si mati dengan tangan kirinya, sementara tangan kanannya memegang pisau dapur yang kecil. PW1 kemudiannya memberi amaran kepada si mati untuk melarikan diri dan pada masa yang sama dia mencuba untuk melucutkan senjata perayu. Si mati melarikan diri ke arah estet ladang kelapa sawit dan perayu mengejar dengan pisau yang masih ditangannya. Si mati kemudiannya dijumpai mati di ladang kelapa sawit tersebut. Ahli kimia ('PW6') mengesahkan bahawa seluar jeans 'Lady Wrangler' ('eksh P31A') yang dirampas daripada perayu dicemari dengan darah si mati dan PW8 mengesahkan bahawa kausa kematian adalah 'Hypovolaemic shock due to or as a consequence of stab wound on the

epigastric region on the abdomen'. Bertentangan dengan kes pihak pendakwaan, perayu berhujah melalui pernyataan yang tidak disahkan daripada kandang ('eksh D1') dan pernyataan di bawah s 112 Kanun Tatacara Jenayah ('KTJ') ('eksh D2') bahawa dia melakukan kesalahan tersebut di dalam pondok. Dalam pernyataannya, perayu menyatakan bahawa dia menikam si mati kerana si mati hendak membunuhnya akibat salah faham mereka dahulu. Pada akhir perbicaraan, mahkamah perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah. Perayu didapati bersalah dan dijatuhkan hukuman mati. Maka rayuan ini. Perayu berhujah bahawa memandangkan tidak terdapatnya tandatangan perayu dalam eksh D1, ini bermaksud yang dia tidak memahami atau bersetuju kepada kandungannya. Dengan itu, terdapat perbicaraan silap dan perbicaraan semula patut diperintahkan. Perayu selanjutnya berhujah bahawa pernyataan perayu dalam eksh D2 tidak dipertimbangkan dengan secukupnya oleh hakim perbicaraan sebelum Yang Arif memberikan keputusan.

Diputuskan, menolak rayuan:

(1) Apabila pembelaan dipanggil, ia adalah hak perayu untuk memberi pernyataan tak bersumpah daripada kandang. Jika dia dipilih untuk memberi pernyataan tak bersumpah, ia tidak boleh menjadi subjek pemeriksaan balas dan beratnya tidak sama kerana keterangan diberi secara bersumpah di dalam kandang saksi. Mahkamah perbicaraan bebas untuk memberi pernyataan kandang berat yang sepatutnya atau langsung tidak, mengambil kira kepada keterangan keseluruhan di hadapan mahkamah (lihat perenggan 20).

(2) Perayu memilih untuk mengemukakan pembelaannya melalui dengan memberikan pernyataan tak bersumpah daripada kandang selepas tiga alternatif cara memberikan keterangan dijelaskan kepadanya. Pernyataan tak bersumpah di dalam eksh D1 dibaca dan dijelaskan kepada perayu dalam Bahasa Malaysia. Perayu mengesahkan bahawa eksh D1 bersama dengan dua ekshibit lain yang dirujuk dalam eksh D1 (yang mana memasukkan pernyataan s 112 nya, eksh D2) adalah pernyataannya. Ia jelas bahawa peruntukan ss 180 dan 181 KTJ telah dipatuhi. Tiada ketidakadilan telah disebabkan terhadap perayu. Oleh itu, tidak terdapat asas untuk permohonan bagi perintah perbicaraan oleh peguam yang bijaksana (lihat perenggan 22).

(3) Berikutan rekod rayuan, hakim perbicaraan tidak memberi perhatian kepada eksh D2. Walau bagaimanapun, memandangkan nilai keterangan eksh D1 adalah marginal atau tidak bernilai, pernyataan dalam eksh D2 tidak dapat menyokong eksh D1 (lihat perenggan 23 & 27–28).]

Notes

For cases on appeal against conviction and sentence, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1736–1737.

For cases on unsworn statement from dock, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3205–3212.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Chukwudi Hassan lwn Pendakwa Raya [2015] MLJU 847; [2015] 8 CLJ 353, CA (distd)

Director of Public Prosecution v Kilbourne [1973] 1 All ER 440, HL (refd)

Songsil Udtoom & Ors v PP [2016] 1 MLJ 41; [2016] 1 CLJ 39, CA (refd)

Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)

Zulkipli Abdullah v PP [2016] MLJU 299, CA (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180, 181, 182A

Penal Code ss 100, 100(a), (b), 102, 300(c), 302, 304

Appeal from: Criminal Trial No TWU-45–8/6 of 2013 (High Court, Tawau)

Abdul Ghani Zelika (Johari & Zelika (TWU)) for the appellant.

Farah Ezlin bt Yusop Khan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zamani A Rahim JCA:

INTRODUCTION

[1] Rewang bin Tempe, the appellant was originally charged with the murder of Jamaluddin @ Atok, the deceased, an offence under s 302 of the Penal Code. The offence was alleged to have taken place on 12 March 2012 at about 11.30am at an unnumbered hut, at Kampung Apas Parit, Batu 15, Jalan Apas, Tawau, Sabah.

[2] Having called 12 witnesses, the prosecution closed its case on 23 June 2014. The appellant's defence was called on the amended charge as follows:

> The Amended Charge
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> That you, on the 12th day of March 2012 at about 11.30am at an oil palm estate at Kampung Apas Parit, Batu 15, Jalan Apas, in the District of Tawau, in the State of Sabah, had committed murder by causing the death of a person known as Jamaluddin @ Atok and that you have thereby committed an offence punishable under section 302 of the Penal Code.

[3] The amended charge was identical to the original charge, save that the place of murder was amended to read 'an oil palm estate' at Kampung Apas Parit, Batu 15, Jalan Apas, Tawau, in the State Sabah.

THE PROSECUTION'S CASE

[4] The appellant, the deceased and one Hassan bin Madu were colleagues. They lived in a hut at Batu 15, Apas Parit, Tawau, Sabah. The owner of the hut was one Sini bin Raia ('PW1').

[5] Hassan bin Madu was an Indonesian national who was believed to have gone back to Sulawesi, Indonesia after the murder.

[6] The appellant, the deceased and Hassan bin Madu had no valid travel documents to enter and remain in Sabah. The three of them worked as farmers by planting and cultivating vegetables. They supplied and sold their vegetables to PW1 who was the vegetables wholesaler.

[7] On 12 March 2012, at about 11.30am, the appellant went to PW1's house to seek the latter's favour to mediate the hostility between him and the deceased. PW1 agreed. Both of them proceeded to the hut where the deceased was staying. Upon arrival there, the deceased was inside the hut. He was seated. Hassan bin Madu was also inside the hut. The size of the hut was about 4 sqmt. The appellant entered the hut, followed by PW1. The appellant was facing the deceased at a distance of approximately 2.5 feet, while PW1 took the seat near the door.

[8] The deceased was heard saying to the appellant 'Apa mahu damai, kita bukan gaduh'. The appellant remained silence. However, a moment later, PW1 noticed the appellant was grabbing the deceased's shoulder with his left hand. The appellant's right hand was holding a small kitchen knife. Fearing that untoward incident might happened, PW1 warned/shouted to the deceased to run away. At the same time, PW1 attempted to disarm the appellant and in the course of doing so, his fingers were cut and bleeding. The deceased was seen jumping down from the veranda of the hut and ran toward the oil palm estate at the back of the hut. The appellant gave chase with the knife was still in his hand.

[9] At about 12 noon the same day, PW1 who by then had returned home, was informed by a person named Lelek that the deceased had died in the oil palm plantation. PW1 went to the said plantation and found that the deceased was indeed dead. The position of the deceased at the scene was as shown in photographs, in exh P3(4)–(6).

[10] The police was alerted and they arrived at the scene about 20 minutes later. The deceased body was removed to the mortuary at Tawau Hospital.

[11] In the mean time, the appellant had fled to Bandar Tawau. At about 5.30pm, he did not know what to do, he approached the policemen patrolling the area of Milimewa Fajar Kompleks, Tawau. The appellant confessed to Cpl Abdul Wahab bin Abdul Rani ('PW11') that he had stabbed the deceased in Apas Parit. The appellant was, accordingly, placed under arrest. He was taken to Tawau Police Headquarters.

[12] At the time of surrender, the appellant was wearing a pair of 'Lady Wrangler' jeans, shown in exh P31A. Subsequently the appellant was handed over to the investigating officer ('IO'), ASP Reduan bin Khalid ('PW7') for further investigation. The exh P31A was seized by the IO. PW7 sent it to the scientific officer ('government chemist'), Zaliha bt Suadi ('PW6') at the Chemistry Department, Kuching for DNA analysis. Upon analysis, PW6 confirmed that the said 'Lady Wrangler' jeans, exh P31A was stained with the deceased's blood. The chemist report was produced and marked as exh P35.

[13] On 14 March 2012, at about 9am, a post mortem was conducted on the deceased's body by Dr Jessie Hiu ('PW8'). PW8 found the marks of injury which she reported as follows:

> A stab wound measuring about 2x1cm (about 2.3cm long when the margins were closed) orientated slightly oblique on the epigastric region of the abdomen. The right end of the wound extended upward as incised wound measuring about 1.5cm long. The left end was sharply cut with abraded area. The wound was directed backward and downward cutting the full thickness of the left lobe of liver, the pancreas and the portal vein. The estimated depth of the wound was 15cm.

[14] PW8 also found the peritoneal cavity of the deceased contained more than one litre of blood.

[15] The cause of the deceased's death as certified by PW8 was 'Hypovolaemic shock due to or as a consequence of stab wound on the epigastric region on the abdomen'.

FINDINGS OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[16] At the end of the prosecution's case the learned trial judge made the following findings:

(a) the death of the deceased, Jamaluddin @ Atok was proven. The deceased's body was identified by his cousin, Rustam bin Dalle. The

cause of the deceased's death was confirmed by PW8 to be 'Hypovolaemic shock due to stab wound on the epigastric region of the abdomen'. PW8 opined that the stab wound involved the major blood vessel, that is, the portal vein with the pancreas being injured. The injury to this blood vessels had caused massive bleeding which caused the death to occur shortly after stabbing. Once the deceased had reached irreversible shock before treatment, the chances of survival was almost nil. The sole stab wound on the epigastric region of the deceased's abdomen was fatal which was in the ordinary course of nature to cause death. PW8 also opined that a sharp object such a knife could have cause the injuries on the deceased;

(b) the deceased's death had been caused by or in consequence of the act of the appellant. The prosecution was relying on the evidence of PW1 and PW6, the scientific officer (government chemist) from the Chemistry Department at Kuching. PW6 testified that upon DNA analysis, she found that the pair of 'Lady Wrangler' jeans, exh P31A worn by the appellant at the time of the murder was detected with the deceased's blood stain;

(c) the appellant's act was done with the intention of either causing death or causing bodily injury sufficient in the ordinary cause of nature to cause the death. The prosecution was relying on s 300(c) of the Penal Code. The evidence showed that the appellant was armed with the kitchen knife when he entered the hut. This was unnecessary as he was supposed to make peace with the deceased. But for the intervention of PW1, the deceased would have been injured by the appellant in the hut. The deceased managed to run into the oil palm plantation at the back of the hut, but the appellant was hot on his heels armed with the knife. Not long thereafter, the deceased was found dead with one stab wound in his upper abdomen;

(d) the trial judge found that there was no evidence of the involvement of a third person who would kill the deceased. On the totality of the evidence, it was an irresistible conclusion that the appellant had inflicted the fatal wound on the deceased with the knife that he was carrying when he had caught up with the deceased. The appellant had armed himself when he went to the hut with PW1. Without wasting much time, he attempted to strike the deceased with the knife, but it was stopped by PW1; and

(e) the trial judge found that the murder was not committed in the unnumbered hut as stated in the original charge, but most probably at the oil palm estate where the deceased was found lying dead. The place of the murder was accordingly amended in the charge and the appellant was called upon to enter his defence.

A THE DEFENCE CASE

[17] Having read and understood the amended charge, the appellant elected to give unsworn statement from the dock. The unsworn statement was marked as exh D1 and his s 112 statement as exh D2.

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[18] According to the appellant, the contents in paras 4, 11–20 of exh D1 were identical to the contents of exh D2. Paragraphs 1–10 and paras 29–30 were additional explanation as advised by his counsel. We can do no better than to reproduce the contents of exh D1 *in extenso* as summarised by the trial judge at pp 195201 of the appeal record, Vol 1 which is as follows:

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Statement From The Dock

(1) Saya memilih untuk memberi keterangan bertulis saya dari dalam kandang tertuduh. Saya memilih cara ini selepas mendengar penjelasan oleh peguam saya pada hari Khamis, 19.6.2014 di Penjara Tawau semasa dia datang melawat.

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(2) Saya dengan ini menyatakan bahawa kebanyakan keterangan ini iaitu perenggan 4, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 dan 28 adalah seratus peratus sama dengan kandungan pemeriksaan dalam percakapan saya di bawah seksyen 112 KPJ yang mana saya berikan pada ASP Ridzuan bin Khalid pada 15.3.2012. Oleh itu saya mohon agar keterangan dalam percakapan tersebut ditandakan sebagai eksibit D1.

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(3) Manakala keterangan didalam perenggan 1, 2, 3, 5, 6, 7, 8, 9, 10, 29 dan 30 pula adalah saya arahkan kepada peguam saya untuk dimasukkan didalam keterangan ini sebagai penjelasan tambahan.

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(4) Saya telah dilahirkan di Bolang, Indonesia. Saya belum berkahwin. Saya bekerja tanam sayur di Kampung Apas Parit, Batu 15, Tawau. Di Apas Parit saya tinggal di pondok bersama Atok dan Hasan. Saya datang ke Tawau pada bulan Februari 2011. Sampai di Tawau saya bekerja sebagai buruh kasar di kolam udang Apas Parit. Sebelum itu saya bekerja tanam sayur di atas kampong tanah kerajaan yang terbiar. Hasil yang saya dapat buat belanja harian saja. Saya tanam terong dan tomato. Hasil akan dijual kepada Pakcik Sini iaitu jika harga RM3, saya akan dapat RM2, Pakcik Sini akan ambil RM1.

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(5) Kejadian ini bermula pada hari Rabu, 7.3.2012 di antara saya dengan Atok. Atok pernah cerita dengan saya bahawa isterinya di kampong di Indonesia telah curang dengan lelaki lain. Jadi waktu itu saya bergurau kata 'daripada mengacau isteri orang, lebih baik kau melancap saja'. Waktu itu saya bergurau tapi Atok pandang saya semacam seolah-olah sungguh marah dan berdendam. Mulai dari situ juga Atok tidak lagi mahu bercakap dengan saya dan kalau nampak saya dia akan sering pura-pura asah parangnya atau menetak-netak sesuatu di dinding atau di tangga. Saya mula rasa takut sebab saya sedar sepatutnya saya tidak boleh cakap begitu. Kalau di kampong kami di Indonesia kalau bercakap begitu

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seolah-olah mengejek si suami dayus tidak mampu puaskan isteri sehingga isteri curang dengan lelaki lain. Kalau di kampong kami mungkin boleh bertengkar sampai berbunuhan.

(6) Pada hari Khamis dan Jumaat, Atok terus berkelakuan begitu dan saya ambil keputusan tidak mahu bermalam di rumah. Saya tidur di rumah kenalan yang saya kenali dengan nama Pakcik Mandar saja. Saya cerita dengan Pakcik Mandar mengenai Atok. Oleh sebab saya pendatang asing tanpa izin maka saya tidak boleh mengadu pada pihak polis sebab kalau mengadu saya pasti akan ditangkap dan kemudian dipenjara lalu disebat. Lagipun tempat kami jauh dari bandar jadi Pakcik Mandar nasihatkan saya supaya minta bantuan daripada Pakcik Sini saja sebab saya, Atok dan Hassan tanam sayur untuk Pakcik Sini dan oleh itu kami anggap dia macam bos kami.

(7) Pada esoknya hari Sabtu, saya pergi tidur di rumah sebab saya harap Atok sudah tidak lagi berdendam dengan saya. Tapi malam itu Atok macam sengaja tidak mahu tidur dalam rumah. Sepanjang malam saya baring tidur-tidur ayam saja dan saya sedar Atok duduk di luar rumah sambil pegang parangnya. Saya rasa sangat takut dia mungkin tunggu saya tidur sebelum tetak saya.

(8) Pada hari Ahad malam lebih kurang jam 8 malam saya di ajak Pakcik Mandar jalan-jalan menengok kolam udang sambil saya ceritakan masalah saya sama dia. Kami balik dan sampai di halaman rumahnya selepas jam 10 malam dan waktu itu kami berdua ada dengar bunyi macam ada orang sedang berjalan dalam rumah Pakcik Mandar (sedangkan sepatutnya tiada orang di rumah masa itu). Rumah juga gelap tiada lampu jadi Pakcik Mandar cakap dengan saya 'Siapa berjalan dalam gelap dalam rumahku tu?'. Saya cakap 'Mungkin si Atok datang cari aku, baguslah aku lari sekarang'. Lepas itu saya lari dalam gelap menuju ke kolam udang tauke Cina mahu cari tempat bersembunyi untuk malam itu.

(9) Bila sampai di kolam udang saya tergelincir dan jatuh ke dalam kolam. Waktu itu saya dengar bunyi macam orang datang jadi saya cepat-cepat ambil penutup sangkar kolam dan letak atas kolam sambil saya bersembunyi di bawah kalbot. Dalam gelap saya nampak orang yang bentuk badannya saya kenal Atok datang dengan lampu suluh dan menyuluh-nyuluh ke dalam kolam dan di sekitar sambil pegang parang. Lepas itu dia pergi.

(10) Saya terus bersembunyi di situ sehingga lebih kurang jam 2 pagi. Masa saya keluar saya dengar lagi macam ada bunyi orang mengejar dari belakang jadi saya lari lagi.

(11) Pada 12.3.2012 jam lebih kurang 2 pagi saya dalam keadaan takut dan dalam keadaan basah kuyup telah pergi ke rumah Abdul, jarak dari rumah saya lebih kurang 20 minit berjalan. Saya keadaan begitu kerana telah

dikejar oleh Atok dengan parang dan saya telah lari hingga masuk ke kolam udang tauke Cina. Saya cuba minta tolong tetapi tiada siapa yang nampak.

(12) Saya dalam keadaan takut telah ketuk rumah Abdul beberapa kali. Abdul buka pintu dan saya masuk ke dalam rumahnya dalam keadaan kelam kabut. Abdul kasi saya tuala, saya buka baju dan seluar yang basah dan pakai tuala hijau muda yang diberi.

(13) Baju dan seluar saya yang basah itu saya letak di halaman rumah Abdul dan boleh dilihat di gambar-gambar eksibit P2(12–14).

(14) Di rumah Abdul dia tinggal dengan isterinya nama tidak tahu orang Bugis umur lebih kurang 30. Umur Abdul lebih kurang 40 tahun. Dia beri saya rokok 'Black Terry' dan saya hisap sebatang. Saya tahu Atok ada tunggu saya di luar dan Abdul juga tahu. Abdul tanya kenapa dan siapa kejar kau. Saya jawap kawan saya sendiri nama Atok. Abdul bertanya lagi saya jawab sebab mungkin dia ada dendam hati dan jika mau boleh berunding dan ini hal akan selesai. Saya cerita dengan Abdul lebih kurang 30 minit.

(15) Saya kenal Abdul lebih kurang 1 tahun sebab sebelum ini saya kerja kolam.

(16) Abdul masuk ke bilik dengan isterinya tidur dan sebelum itu ada bagi saya tilam dan saya tidur dekat dengan dapur rumah Abdul. Saya baring-baring atas tilam tetapi tidak boleh pejam mata.

(17) Pagi lebih kurang samar-samar mahu terang, saya bangun dan masa itu Abdul dan isterinya juga bangun. Tidak lama saya ke dapur cuci muka. Saya diberi minum air panas Nescafe. Setelah selesai minum saya minta diri keluar.

(18) Dalam keadaan pakai tuala tanpa kasut saya pergi ke rumah 'mandor' jalan kaki lebih kurang 20 minit yang saya kenal lebih kurang 1 tahun. Sampai di rumah mandor lebih kurang jam 6 pagi sebab masa itu matahari mula keluar dan nampak mandor bawah kolong.

(19) Saya minta pinjam baju dari mandor tetapi dia tak kasi pinjam. Saya terus jalan ke rumah Pakcik Sini jalan kaki lebih kurang 20 minit. Sampai ke rumah Pakcik Sini saya nampak cuma anak perempuannya nama Mujahidah.

(20) Saya terus pergi ke pondok belakang tempat saya tinggal. Masa itu Hassan ada di rumah dan saya naik. Atok tidak ada di rumah dan saya minta pinjam seluar jean Hassan. Kemudian dia bagi beri saya pakai baju merahnya tapi saya tidak mahu. Saya pakai baju hitam kolar bulat, lengan pendek tiada tulis apa-apa kosong saja. Hassan bancuh Nescafe 'O' dan saya minum. Lebih kurang 30 minit saya turun balik ke bawah kolong Pakcik Sini dalam keadaan takut. Saya kemudian duduk di tangga dapur.

(21) Lebih kurang tengahari baru Pakcik Sini dan Makcik Maseng isterinya P/Bugis umur lebih kurang 50 tahun balik dari jual sayur di bandar pakai van. Saya, Pakcik Sini dan Makcik Maseng naik ke rumahnya. Kemudian

saya cerita dengan Pakcik Sini kenapa Atok mau pukul saya dan saya minta bantuan Pakcik Sini untuk jadi saksi untuk jumpa dengan Atok di rumah belakang. Masa itu saya ada bawa pisau yang saya pinjam dengan 'mandor' pisau tersebut panjang lebih kurang 7 inci dan sarung warna putih dan hulu dia saya tidak ingat warna.

(22) Saya dengan ditemani Pakcik Sini pergi ke pondok saya tempat saya tinggal. Sampai di rumah lebih kurang tengahari Pakcik Sini naik dulu dan saya naik kemudian. Saya nampak Atok dan kemudian Hassan sedang duduk cerita-cerita.

(23) Selepas beri salam Pakcik Sini jadi orang tengah untuk damai saya dengan Atok ataupun nama sebenarnya Jamaludin. Saya ada cakap dengan Atok kenapa mau bunuh aku. Dia bilang, siapa juga mau bunuh kau. Aku bilang kalau betul kau tidak mau bunuh aku, boleh kau bersumpah dengan Al-Quran. Atok diam sahaja dan tidak mahu pandang saya. Aku kasi tau lagi perkataan yang sama 3 kali tetapi dia tidak mahu jawab. Saya naik geram dan tiba-tiba saya terus tikam Atok dengan pisau yang saya bawa dan kena di dadanya.

(24) Apabila nampak tindakan saya itu Pakcik Sini dan Hassan bising-bising. Selepas ditikam, Atok tolak pisau yang saya tikam dia. Atok bangun dan terjun ke luar pondok. Tiba-tiba Atok lari menghala ke bawah kebun sawit ikut belakang pondok lebih kurang 100 meter. Saya kejar dia dengan tujuan mahu tahu kemana dia pergi dan apabila sampai dekat tempat kumpul tembikai ada nampak seorang lelaki dan saya terus naik ke atas semua. Pakcik Sini dan Hassan saya tidak tahu ada ikut atau tidak. Saya tidak tahu lagi apa terjadi kepada Atok.

(25) Saya kemudian masukkan semula pisau ke dalam sarung dan letak di dalam seluar. Sampai di jalan besar saya ada tahan orang sedang naik motor nama saya tidak tahu dan saya cakap mau tumpang pergi ke bandar. Lelaki itu suruh naik dan saya tumpang di belakang. Lebih kurang 10 minit selepas di jalan besar iaitu di Jalan Apas, saya turun di simpang dan saya ucap terima kasih kepada lelaki itu.

(26) Saya kemudian jalan kaki tanpa pakai kasut masuk ke kanan dan lelaki itu naik motor menghala ke Bandar Tawau. Lebih kurang beberapa minit saya sampai di seberang jalan dan di sana ada pondok tunggu bas. Lebih kurang 10 minit bas mini putih (van) sampai. Saya naik bas masuk dan terus duduk di belakang sekali dan masa itu saya terus buang pisau tadi ke tepi jalan.

(27) Saya kemudian pergi ke Balong untuk ke rumah kawan nama Sindang. Lebih kurang 20 minit sampai di Balong dan turun bas saya bayar RM2. Sampai rumah Sindang dia tiada di rumah. Oleh kerana Sindang tidak ada di rumah, saya turun semula ke Bandar Tawau. Lebih kurang petang sudah saya sampai di Bandar Tawau dan saya rasa macam mau lari tetapi saya tidak ada duit di dalam poket hanya ada RM150. Sampai di lorong-lorong saya rasa macam ada orang ikut saya, saya rasa tidak tentu arah.

(28) Saya tidak tahu kemana arah mau pergi sebab jiwa saya tidak tenteram dan kacau. Apabila sampai dekat pusat belibelah saya ada nampak polis. Masa itu saya hanya pakai seluar, baju dan kasut saya tidak ada. Saya mau serah diri pada polis dan nampak 3 orang polis dan saya terus cerita bagitahu aku tikam kawan aku di Apas Parit. Dia hidup atau mati saya tidak tahu. Polis terus gari saya dan bawa naik kereta polis terus ke Balai Polis Tawau.

(29) Saya disini ingin menjelaskan bahawa saya tidak ada niat mahu bunuh Atok. Malahan pada awalnya saya ajak Pakcik Sini temankan saya supaya dia boleh pujuk Atok berdamai dengan saya. Saya cuma menikam Atok sebab saya waktu itu yakin dia tidak mahu undur niatnya mahu bunuh saya. Saya yakin sebab kalau betul dia tidak mahu bunuh saya maka mengapa dia tidak mahu bersumpah guna Al-Quran? Sebaliknya dia diam saja tidak mahu bersumpah sedangkan saya sudah cabar dia bersumpah tiga kali. Bila dia tidak mahu bersumpah maka saya marah bila ingatkan malam sebelumnya dia kejar saya ke kolam udang. Jadi saya ambil keputusan tikam dia untuk cederakan dia tapi kami bergelut dan pisau saya termasuk ke dadanya satu kali.

(30) Saya juga mahu jelaskan bahawa saya percaya orang macam saya iaitu pendatang asing tanpa dokumen yang miskin dan cuma tanam sayur tidak akan dapat minta bantuan polis. Kalau pergi balai pasti akan ditangkap dan kemudian dipenjara lalu disebat saja sebelum dihantar pulang ke Indonesia. Disini saya cuma berkawan dengan si Atok, si Hassan dan Pakcik Mandar saja tapi mereka semua pun orang Indonesia tiada dokumen di Malaysia. Saya juga tiada saudara mara di Malaysia untuk minta bantuan berlindung. Saya cuma boleh mengharap pada Pakcik Sini saja sebab dia bos kami dan ada mykad. Lagipun masa bergelut dengan Atok saya yakin saya sudah tiada masa lagi. Kalau Pakcik Sini pun tidak boleh damaikan saya dengan si Atok maka pasti malam selepas itu si Atok akan datang mengejar saya lagi.

Dibacakan kepada dan diperakui oleh tertuduh:

REWANG BIN TEMPE

Pada:

THE FINDINGS OF THE TRIAL JUDGE AT THE END OF THE TRIAL

(a) the appellant's unsworn statement, in exh D1 was inconsistent. First he said he felt agitated and intentionally stabbed the deceased, when the latter did not swear on the Al-Quran. At para 29 of exh D1, the appellant said that he decided to stab and injure the deceased, but when they were scuffling with each other, the knife accidently struck the deceased's chest once;

(b) the evidence of PW1 did not mention that the deceased was stabbed during the scuffle either intentionally, unintentionally or accidently. Instead PW1 said that the appellant grabbed the shoulder of the deceased with his left hand. The appellant's right hand was holding a

small kitchen knife which he raised up to stab the deceased. It was stopped and blocked by PW1 until his fingers were injured. PW1 shouted at the deceased to run away which he did, but the appellant chased the deceased into the oil palm plantation. The evidence of PW1 was not challenged by the defence in cross-examination and therefore deemed to have been accepted;

(c) the fact that the appellant admitted to have stabbed the deceased in the hut was not put at the earliest reasonable opportunity during the prosecution's case, especially in the cross-examination of PW1. Such failure to do so could only meant that the defence was not steadfast in its own case. Furthermore, the absence of the deceased's blood stain in the hut had refuted the appellant's version that the deceased was injured in the hut;

(d) the trial judge did not accept that the deceased's failure to swear on the Al-Quran constituted a grave and sudden provocation or provided a justification for the appellant to exercise his right of self defence under s 100 of the Penal Code. These was not a slightest indication that the deceased did intend to attack the appellant. The deceased merely kept silence. The elements of the right of private defence of reasonable apprehension of death or grievous hurt or danger to the body under s 100(a) and (b) and s 102 of the Penal Code could not have been satisfied;

(e) the trial judge found that there was no valid ground to amend and reduce the charge under s 304 of the Penal Code. The intention of the appellant was manifest that he had armed himself to kill or cause bodily injury to the deceased, if the deceased did not settle the score with him. The trial judge also found that the appellant could not exercise his right of private defence to entitle him to rely on the exception to s 300 of the Penal Code; and

(f) finally, the trial judge found that the defence had failed to cast a reasonable doubt on the prosecution's case. The prosecution had, therefore, proved its case against the appellant beyond reasonable doubt. The appellant was found guilty and convicted as the amended charge. He was sentenced to death by hanging.

THE APPEAL

[19] Learned counsel before us was obviously not defence counsel in the trial before the High Court. Before us two issues were raised, namely:

(a) the appellant gave his evidence by way of an unsworn statement from the dock. The statement was marked as defence exh D1. The notes of proceeding at p 156 of the appeal records showed that exh D1 was only

read and explained to the appellant in Bahasa Malaysia. As this was a case of capital punishment learned counsel argued, it was vital for the trial judge to ensure that the appellant fully understood and agreed to the contents of exh D1, prepared by his advocate then. As there was absence of the appellant's signature in exh D1, this meant that he did not understand or agree to its contents. It was, therefore, a mistrial and the conviction of the appellant was not safe. Learned counsel urged us to order a retrial; and

(b) the statement of the appellant recorded under s 112 of the Criminal Procedure Code ('CPC') in exh D2 was not sufficiently considered by the trial judge before His Lordship passed the verdict at the end of the defence case. The importance of the s 112 of CPC statement was highlighted in the Federal Court case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705. The notes of proceeding, showed that the trial judge did not give a full or sufficient consideration to the statements in exh D2 (see *Songsil Udtoom & Ors v Public Prosecutor* [2016] 1 MLJ 41; [2016] 1 CLJ 39 and *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353). On this ground too, learned counsel urged us to allow the appeal.

OUR DECISION

[20] In our view when the defence is called, it is the appellant's right to give an unsworn statement from the dock. If he elects to give unsworn statement, it cannot be the subject of cross-examination and its weight is not the same as the evidence given on oath in the witness box. The trial court is free to give the dock statement the weight it deserves or not at all, having regard to the whole evidence before the court.

[21] Recently this court in the case of *Zulkipli Abdullah v Public Prosecutor* [2016] MLJU 299, had the occasion to consider the evidential value of the dock statement. It was observed as follows:

> [34] The appellant gave an unsworn statement from the dock. His statement is not subject to cross-examination by the prosecution, nor can he be questioned by the trial judge. Its veracity is not tested. The trial judge is free to give the dock statement such weight as he thinks fit and he can take it into consideration in deciding whether the prosecution has proved its case. In *Dato' Seri Anwar Ibrahim v Public Prosecutor & Another Appeal* [2015] 2 CLJ 145 the Federal Court observed at p 199 as follows:
>
> > In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross examination by the prosecution nor can he be questioned by the trial judge (*Lee Boon Gan v Regina* [1954] 1 MLJ 103, *Udayar Alogan & Ors v Public Prosecutor* [1962] 1 MLJ 39, *Mohamed*

Salleh v Public Prosecutor [1969] 1 MLJ 104, *Juraimi Husin v Public Prosecutor* [1998] 1 MLJ 537). A

The Federal Court went on to say at p 200 as follows:

> While it is true that it is within the appellant's right to give a statement from the dock, that statement must however amount to a credible defence. A mere denial does not amount to a credible defence. B

[22] The notes of proceedings at p 155 of the appeal records showed that the trial judge was satisfied that a prima facie case had been made out against the appellant. His defence was called. The appellant elected to put up his defence by way of giving an unsworn statement from the dock after the three alternatives of giving evidence were explained to him. The unsworn statement in exh D1 was read and explained to the appellant in Bahasa Malaysia. He confirmed that exh D1 together with two other exhibits referred to in exh D1 (which included his s 112 statement, exh D2) were his statements. The appellant did not call any other witnesses. He closed the defence case. It would appear that the provisions of ss 180 and 181 of the Criminal Procedure Code ('the CPC') had been complied with. No miscarriage of justice had been occasioned against the appellant. Therefore, there was no basis for learned counsel's request for an order of trial. C D E

[23] The second complaint by the appellant was that the trial judge failed to consider his s 112 statement in exh D2. The trial judge by reason of s 182A of the CPC, shall consider all the evidence adduced before it. This necessarily includes the statements in exh D2. Failure to do so is a miscarriage of justice by way of non direction (see *Songsil Udtoom & Ors v Public Prosecutor* [2016] 1 MLJ 41; [2016] 1 CLJ 39). This allegation that the trial judge did not consider exh D2 was incorrect. The trial judge did address his mind to exh D2. At p 201 of the appeal record, His Lordship said as follows: F G

> Accused's statement recorded under s 112 CPC ('exh D2') tendered by the accused narrated substantially the same version as his unsworn statement which is nevertheless more detail. Defence did not call any other witness.

H

[24] To further support his contention, learned counsel for the appellant also cited the case decided by this court in *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353 where it was held:

> (a) If the cautioned statement of the appellant was accepted as true by the trial judge, the appellant was definitely entitled to an order of discharge and acquittal because without the evidence of knowledge, the appellant did not commit any offense. In connection to this, it was undisputed that the trial judge failed to consider the contents of the appellant's cautioned I

statement. This failure brought about serious injustice to the appellant because the appellant had missed an opportunity to be found not guilty on the charge;

(b) The statement in the appellant's cautioned statement was similar to the statement by the appellant in his defence in court which was rejected by the trial judge. Therefore, it may be argued that the trial judge's decision would remain the same, namely to reject the appellant's cautioned statement. However, it was not appropriate for an appellate court to speculate that if the trial judge had considered the appellant's cautioned statement, the trial judge would also definitely reject the appellant's explanation in court. It was a question of fact to be determined by the trial judge and it involved the issue of credibility;

(c) The prosecution in cross-examination did not challenge the appellant's statements in his cautioned statement. Although the statement of the appellant in his cautioned statement may not be true, without such challenge, it was not appropriate for an appellate court to make the assumption that it was absolutely not true. In terms of law, failure to challenge evidence favourable to the accused could be considered as an admission that the evidence was not disputed. Therefore, appellant's conviction was not safe.

[25] In his written submission, learned counsel argued that the appellant's statement in his cautioned statement was not challenged in cross-examination, despite the fact that the cautioned statement was an independent evidence apart from written unsworn statement which was tendered by the appellant during the defence case. In the absence of any challenge, the appellant's version as stated in the cautioned statement shall be deemed to be admitted as decided in *Chukwudi Hassan*'s case, and the Federal Court case of *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236.

[26] Learned counsel went on to argue that it was the appellant's version in the cautioned statement that, he did not stab the deceased in the oil palm estate. This statement was not challenged by the prosecution. Therefore the trial judge had erred in his factual finding that the appellant had stabbed the deceased in the oil palm estate.

[27] The fact in *Chukwudi Hassan*'s case, may be distinguished with the facts in the present case. Firstly, in this case, we were dealing with a different cattle of fish altogether, that is, we were dealing with s 112 statement, exh D2 and not a cautioned statement as in *Chukwudi Hassan*'s case. Secondly, contrary to the argument of learned counsel, the statements in exh D2 was addressed but could not be challenged and tested as the appellant was taking refuge by electing to give an unsworn statement from the dock. He could not be cross-examined. Thirdly, exh D2 was not admissible as substantive evidence (learned counsel termed it as independent evidence) but at best, merely to corroborate the

statement of the appellant from the dock.

[28] As the evidential value of exh D1 is marginal or worthless, the statement in exh D2 cannot corroborate exh D1 for reason stated by the English House of Lord's case of *Director of Public Prosecution v Kilbourne* [1973] 1 All ER 440 where Lord Hailsham said:

> Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanition the question of his needing or being capable of giving, corroboration does not arise.

[29] On the totality of the evidence before us, the appellant's conviction and sentence was safe. There was no error in law or mishandling of facts by the trial judge warranting our intervention. The appeal was dismissed.

Appeal dismissed.

Reported by Dzulqarnain Ab Fatar